UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOANNE M. WOODS, Individually and as Administratix Of the Estate of KRISTIAN T. WOODS, and as court-appointed Guardian of Property for MYDASIA A. WOODS, IZAIAH K. WOODS, and MARIYAH A. WOODS.

Plaintiff,

-vs-

Civil Docket No. 13-cv-0798 S

TOWN OF TONAWANDA
COUNTY OF ERIE
OFFICER MICHAEL MARCIANO,
OFFICER FLATAU, OFFICER NICHOLAS SALONIKIS,
LT. BAUMGARTNER, OFFICER MCNAMARA, OFFICER MURPHY,
LT. MCNAMARA, MICHAEL BOTHAM, OFFICER FRANCO,
OFFICER LEWANDOWSKI, JAMES FRANKLIN,
THOMAS THOMPSON, TIMOTHY HIGGINS, MARK MARREN,
ERIC FINTAK, JOHN GAVIN, JUSTIN TEDESCO, CHAD MYERS,
CESAR BOTELLO, JOHN "JACK" ROBINSON, PHILLIP KUPPLE,
DANIEL HARRIS, SGT. ANTHONY LODESTRO, and DEP. HALADAY

Defendants.

COUNTY DEFENDANTS' MEMORANDUM OF LAW IN REPLY TO PLAINTIFF'S OPPOSITION AND IN FURTHER SUPPORT OF ITS' MOTION FOR SUMMARY JUDGMENT

This Memorandum of Law is submitted on behalf of the County Defendants in reply to the Plaintiff's opposition to and in further support of its Motion for Summary Judgment dismissing the Plaintiff's case in its entirety.

To the extent that the arguments contained within the Town Defendants' Reply Memorandum of Law serve as a reply in further support of arguments made by the County Defendants in their original Memorandum of Law, the County Defendants hereby incorporate by reference those arguments as fully set forth in the Town Defendants' Reply papers.

ARGUMENT

POINT I

PLAINTIFF DID NOT COMPLY WITH LOCAL RULE 56 (a)(2)

Pursuant to Rule 56 (a)(2) of the Local Rules of Civil Procedure for the United States District Court for the Western District of New York, Plaintiff was required to respond to each numbered paragraph in the County Defendants' Rule 56 Statement of Undisputed Material Facts in correspondingly numbered paragraphs. Plaintiff has failed to do so.

In Paragraph 4 of the Declaration of Steven M. Cohen, Esq. submitted in support of Plaintiff's Opposition to the Defendants' Motion for Summary Judgment, Mr. Cohen only "strenuously objects to both the County Defendants' and the Town Defendants' Rule 56 Statements of Undisputed Material Facts. As stated in Rule 56 (a)(2), "[e]ach numbered paragraph in the moving party's statement of material facts may be deemed admitted for purposes of the motion unless it is specifically controverted by a correspondingly numbered paragraph in the opposing statement." Because Plaintiff has failed to respond to any of the paragraphs in the County Defendants' Statement of Undisputed Material Facts, each and every paragraph should be deemed admitted for purposes of this Motion for Summary Judgment.

POINT II

THE UNDISPUTED MATERIAL FACTS SHOW THAT THE COUNTY DEFENDANTS WERE NOT DELIBERATELY INDIFFERENT TOWARD THE DECEDENT REGARDLESS IF HIS HEALTH CONDITION EVER ROSE TO THE LEVEL OF AN OBJECTIVELY SUFFICIENTLY SERIOUS RISK

The County Defendants respectfully advise this Court that Plaintiff's Memorandum of Law in opposition contains numerous attempts to muddle the timeline of events, and ultimately to misguide the Court to create a question of fact. On page 4 of Plaintiff's Memorandum of Law in opposition, Plaintiff references Deputy Gavin's observation of the decedent's behavior, which consisted of ranting, raving, sweating, and stating that he wanted to die. What actually occurred was that the decedent was exhibiting this behavior while he was already being transferred to ECMC so that he could receive proper treatment. Rule 56 ¶ 98.

However, in the next paragraph, Plaintiff jumps back in time to the previous day when the decedent initially presented to the Erie County Holding Center, when he was calm, lucid, and exhibiting no concerning behavior or signs of medical issues. Plaintiff is attempting to confuse the Court by making it seem as though Plaintiff was ranting, raving, and otherwise exhibiting concerning behavior when he was initially evaluated. This was not the case. The decedent did not begin acting out of the ordinary until the next day during his third interview with County personnel, Deputy Robinson. (Rule 56 ¶ 48) Deputy Robinson testified that initially there didn't seem to be anything wrong with the decedent, but that halfway through the decedent became vague with his answers. (Rule 56 ¶ 49,50,53) This prompted Deputy Robinson to refer the decedent for a mental health evaluation with Kelly Ghani. (Rule 56 ¶ 55) The decedent saw Kelly Ghani for evaluation within 15 minutes of his interview with Deputy Robinson. (Rule 56 ¶ 58) During Ms. Ghani's evaluation, the decedent's behavior escalated and he drew a weapon from his pants. (Rule 56 ¶ 65-69) Because of the decedent's failure to comply with Ms. Ghani and the deputies, the evaluation had to be cut short, and Ms. Ghani immediately referred the decedent to be transferred to ECMC to receive proper treatment. (Rule 56 ¶70-74) She immediately called and faxed the decedent's paperwork to ECMC to ensure that had the necessary information to treat him. (Rule 56 ¶ 75) It is at this point that Deputy Gavin's testimony comes in to fill the timeline, that is, while the decedent was already being tended to by County personnel, not before the decedent met with Kelly Ghani as Plaintiff's Memorandum of Law suggests. Actions were taken to assist the decedent as they became apparent. The decedent did not present to the Holding Center exhibiting any behavior that would lead County personnel to believe that this person was in need of immediate medical attention. There was no deliberate indifference as appropriate and prompt action was taken as soon as it appeared there was a need for it.

Should this Court find that the decedent's behavior rose to the level of a sufficiently serious risk to satisfy the objective prong of an Eighth Amendment claim, it is urged that decedent's behavior only rose to such a level after the County Defendants were already acting to ensure that he received evaluation and treatment.

Plaintiff also attacks the actions of Kelly Ghani. Plaintiff's Memorandum of Law in Opposition, p. 6. Plaintiff's argument attempts to discredit Ms. Ghani as a mental health professional for not properly evaluating the decedent, specifically criticizing her notations of "unable to assess" to certain inquiries on the Mental Health Assessment form. Plaintiff fails to address or consider the fact that the evaluation could not be completed because the decedent drew a weapon on Ms. Ghani, and thus prematurely ending the evaluation, and causing her to refer him to ECMC.

Plaintiff continues to claim that the decedent presented to the Holding Center "acting irrationally, in a bizarre fashion, while sweating and with glazed eyes" without ever citing to any authority. Plaintiff's Memorandum of Law in Opposition, p. 8, 10. He does not cite to any evidence, because there is none. The decedent was not exhibiting any of those characteristics when he arrived at the Holding Center. Rule 56 ¶34, Exhibit K. This is another attempt by Plaintiff to misguide the Court. As soon as the decedent began exhibiting minimal signs of mental instability, which was not until the next day with Deputy Robinson, the County Defendants took multiple course of action to ensure the decedent received proper evaluation and treatment.

For the foregoing reasons, in addition to the County Defendants' original Motion papers, it is respectfully submitted that the County Defendants' have shown that they did not delay or deny the decedent's access to medical treatment, did not act with deliberate indifference, and that Plaintiff has failed to raise an issue of fact.

POINT III

PLAINTIFF FAILS TO SEE THE DISTINCTION BETWEEN THE ERIE COUNTY SHERIFF AND THE ERIE COUNTY SHERIFF'S DEPARTMENT

The County Defendants explained in its original Memorandum of Law that the Erie County Sheriff is the proper party to sue for claims such as failure to train. This is so, because the policies and procedures followed by the deputies are policies of the Sheriff and enforced by the Sheriff. Any relevant policies or procedures are established, implemented, and enforced by the Erie County Sheriff, not by the County of Erie. Nor is County of Erie responsible for the training and supervision of Erie County Sheriff's deputies pursuant to the policies and procedures of the Erie County Sheriff. Unfortunately for Plaintiff, the Erie County Sheriff was not sued in this case. However, any liability for failure to train cannot be transferred to the County of Erie because Plaintiff failed to sue the proper party.

Further, the Erie County Sheriff's Department, which is not a separate legal entity subject to suit, is completely different from the Erie County Sheriff, who is an elected official who establishes and enforces his own policies and procedures upon his deputies. The County of Erie cannot be responsible for policies and procedures that it did not create and does not enforce. Therefore, any claims against the County of Erie must be dismissed.

POINT IV

MICHAEL LEVINE DOES NOT QUALIFY AS AN EXPERT UNDER RULE 702 OF THE FEDERAL RULES OF EVIDENCE

The County Defendants urge this Court to disregard the expert report of Michael Levine. Mr. Levine's report seeks to diagnose Kristian Woods postmortem with Excited Delirium Syndrome. Aside from the fact that Mr. Levine is not a doctor and therefore unqualified to make any diagnoses, the remainder of Plaintiff's case is premised on the importance of the decedent's Risperdal prescription. Plaintiff's case is based on the decedent's history of psychotic episodes, his alleged need for his Risperdal prescription, and the County's failure to provide same. Excited Delirium Syndrome is not relevant in this case. As argued in Plaintiff's Memorandum of Law in Opposition, the expert's knowledge of the subject should assist the trier of fact in arriving at the truth. Plaintiff's Memorandum of Law in Opposition, p. 12. Mr. Levine's testimony inappropriately diagnosing the decedent with Excited Delirium Syndrome would only confuse the jury and detract from the decedent's actual mental health history and his Risperdal prescription, which appears to be of great importance to Plaintiff's case as evidenced in the remainder of her papers.

The articles that Mr. Levine claims he based his opinions on are all police-related publications, rather than articles from medical journals. Docket No. 74-1 pp. 21,26,28,32,35. Further, Mr. Levine incorrectly states that in this case "police-related publications" are more reliable than medical publications. However, under *Daubert*, medical peer review articles should be the basis of support for a medical diagnosis, such as Excited Delirium Syndrome. *See generally Daubert v. Merrell Dow Pharmeceuticals, Inc.*, 509 U.S. 579 (1993). Even if Mr. Levine based his opinion on articles from medical journals, he is still unqualified to make a diagnosis as he is not a doctor. Therefore, his expert report diagnosing the decedent with Excited Delirium Syndrome should be excluded.

POINT V

THE COUNTY CANNOT BE LIABLE UNDER THE THEORY OF RESPONDEAT SUPERIOR

Plaintiff argues that the County is liable under the theory of *respondeat superior*, because it is the true party of interest as it is responsible for indemnifying the deputies in this action. This argument is wholly irrelevant to liability. Plaintiff ignores the entire body of law surrounding municipal liability for violations of constitutional rights as explained in the County Defendants original Memorandum of Law. The County Defendants respectfully refer the Court to this argument under Point III of the Memorandum of Law. Further, the County's duty to indemnify these deputies is presently being fulfilled as it is the County who is providing the deputies with legal representation.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant summary judgment dismissing all causes of action against the County of Erie and all named Erie County Sheriff Deputies and grant such other and further relief as the court may deem proper.

DATED: March 29, 2017
Buffalo, New York

Respectfully submitted,
Michael A. Siragusa, Esq.
Erie County Attorney

s/ Thomas Navarro
Thomas J. Navarro, Esq.
Assistant County Attorney, of Counsel
Attorney for County of Erie and Erie County Sheriff Deputies Thomas Thompson, Timothy Higgins, Mark Marren, Eric Fintak, John Gavin, Justin Tedesco, Chad Myers, Cesar Botello, John "Jack" Robinson, Phillip Kupple, Daniel Harris, Sgt. Anthony Lodestro, and Dep. Haladay
Office and Post Office Address
95 Franklins Street, Room 1634
Buffalo, New York 14202

CERTIFICATE OF SERVICE

The undersigned, being over 18 years of age and not a party to this action, hereby certifies that on March 29, 2017, he caused a true and correct copy of the foregoing Memorandum of Law in Support of Defendants' Motion for Summary Judgment to be served upon the parties in this action by causing the same to be delivered via first class mail/ postage prepaid to their attorneys at the following addresses:

Steven M. Cohen, Esq.
Hogan Willig
Attorney for Plaintiff
2410 North Forest Road, Suite 301
Getzville, New York 14068
Email: scohen@hoganwillig.com

Mark P. Della Posta, Esq.
Walsh Roberts & Grace
Attorney for the Co-Defendants Town of Tonawanda, Office Michael Marciano, Officer Flatau, Officer Nicholas Salonikis, Lt. Baumgartner, Officer McNamara, Officer Murphy, Lt. Mcnamra, Michael Botham, Officer Franco, and Officer Lewandowski
400 Rand Building
14 Lafayette Square
Buffalo, New York 14203-0133
Email: mdellaposta@walshrobertsgrace.com

Dated: Buffalo, New York
March 29, 2017

s/ Thomas Navarro
Thomas J. Navarro, Esq.
Assistant County Attorney, of Counsel
Attorney for County of Erie and Erie County Sheriff Deputies Thomas Thompson, Timothy Higgins, Mark Marren, Eric Fintak, John Gavin, Justin Tedesco, Chad Myers, Cesar Botello, John "Jack" Robinson, Phillip Kupple, Daniel Harris, Sgt. Anthony Lodestro, and Dep. Haladay
Office and Post Office Address
95 Franklins Street, Room 1634
Buffalo, New York 14202